

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRTIETH REGION

Milwaukee, Wisconsin

**AMERICAN UNITED TAXICAB
DISPATCH SERVICES, INC.¹**

Employer

and

Case 30-RC-6580

**UNITED STEELWORKERS OF
AMERICA, AFL-CIO-CLC²**

Union/Petitioner

DECISION AND ORDER

This is my determination as to the appropriateness of the unit sought by the Petitioner, who seeks to represent all full time and regular part time cab drivers employed at the Employer's Milwaukee, Wisconsin facility; excluding all managerial employees, clerical employees, supervisors and guards as defined by the National Labor Relations Act. The Employer contends that the petition should be dismissed because taxi drivers (both owner-operators and leasing drivers) are independent contractors and not statutory employees within the meaning of Section 2(3) of the Act. If the drivers at issue are found to be employees, an additional issue exists regarding the proper scope of the unit. As discussed below, I have concluded that the petitioned for individuals are independent contractors under the Act, and it is unnecessary to address issues regarding unit scope. Accordingly, the petition is dismissed.

Petitioner filed a petition under Section 9(c) of the Act, as amended. Pursuant to the provisions of Section 3(b) of the Act, I have the authority to hear and decide this matter on

¹The name of the Employer appears as amended at hearing.

²The name of the Petitioner appears as amended at hearing.

behalf of the National Labor Relations Board (Board). A hearing was held before a hearing officer of the Board, and timely briefs from the Employer and Petitioner have been received and duly considered. Following the hearing, on August 31, 2004, the Union filed a Motion to Re-Open the Record, seeking to submit two additional exhibits, Petitioner's 5 and 6. By its September 3, 2004, response the Employer indicated it had no objection. Accordingly I am hereby receiving Petitioner's Exhibit 5 and 6 into the record.³

Background

The Employer's business is best understood as providing two services. First, the Employer operates a radio dispatch service available to any taxicab driver in the Milwaukee, Wisconsin metropolitan area that wishes to subscribe. Second, it is the day-to-day manager of taxicab drivers who lease vehicles from a separate division of the Employer's operation, Joe Sanfelippo Cab Co., Inc.⁴ Both operations are performed out of the Employer's Milwaukee office, staffed by approximately 60 to 70 employees. These employees include call-takers, dispatchers, check cashing clerks, auditors, an assistant operations manager and a dispatch room manager. The Employer's General Manager is Richard "Red" Christensen.

A taxicab driver may own his or her own vehicle or lease a vehicle from a service that provides cabs. Drivers who own their own vehicles are known as owner-operators, and drivers

³ Upon the entire record I find the following: 1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed. 2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction. The parties stipulated, and I find, that the Employer, a Wisconsin Corporation with an office and place of business in Milwaukee, Wisconsin, is engaged in the business of providing a taxicab dispatching service. During the past calendar year, a representative period, the Employer derived gross revenues in excess of \$500,000 from its business operations. Also, during this same period the Employer purchased and received goods, supplies and materials valued in excess of \$50,000. 3. Petitioner is a labor organization within the meaning of Section 2(5) of the Act. 4. No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(a) and Section 2(6) or (7) of the Act.

⁴ American United Taxicab Dispatch Service, Inc. and Sanfelippo Cabs have common ownership, although they are separate corporations. These entities also share common ownership with United Veteran Cab, Inc., American United Taxicab, and Sanfelippo Auto Repair. The Employer acknowledges, in brief, that these entities operate as "a single firm," and I find for the purpose of this decision that they constitute a single employer.

who lease a vehicle from a vehicle provider are known as lease drivers.⁵ How the terms and conditions of these distinct classifications differ is discussed infra, but in terms of using the Employer's radio dispatch system both owner-operators and lease drivers follow the same procedure and compete for the same business. When starting work a driver logs into the mobile display terminal located in the vehicle, which indicates to the dispatcher where the vehicle is located. The driver is then "posted" in that zone, the geographic area where the driver is eligible to collect fares. When a customer calls for service a call taker at the Employer's radio dispatch office takes the essential information, such as location and method of payment, and enters it into the Employer's computer system. The order is then available for the dispatcher to distribute.

The dispatcher determines which driver is next in line in the particular zone and sends the fare to that driver. Order is determined on a first in, first out basis. Once received, the driver has the opportunity to accept or refuse the fare without penalty. If the driver refuses the fare the next driver in the zone is given the opportunity to accept the fare. If no other driver is in the zone the opportunity to collect the fare is broadcast to all recipients of the service and it is open to any driver, regardless of location. If the driver accepts the fare it is expected to be serviced in a timely manner (the dispatcher receives notice when the driver's meter is turned on and can monitor service accordingly). If more than five or ten minutes pass and the meter has not yet been engaged the dispatcher is at liberty to reassign the fare to another driver. The driver has the ability to reject an accepted fare in this manner, this usually occurs if additional information obtained after acceptance makes the fare undesirable. In response, however, the dispatcher will remove the driver from the network until another driver services the fare, at which time the driver is brought back on the system. This removal is known as a "suspension" in the trade.

⁵ The Employer has lease agreements with approximately 240 lease drivers. 78 owner-operators, all of whom the Union also seeks to represent, subscribe to the Employer's dispatch service.

Once the driver picks up the fare and transports the passenger to his or her destination the next point of concern for the driver is method of payment. A significant number of radio dispatched fares are co-called “voucher fares.” Voucher fares are billed to a third party as compared to a direct passenger payment, and can include insurers sending patients to a doctor, employers sending employees to various destinations and other arrangements. The single largest source of voucher fares is a Milwaukee County Transit-Plus program that provides transportation to individuals with disabilities. When a driver services a voucher fare the driver submits the paper voucher to the payment clerk at the Employer’s office and the driver is paid up front in cash, minus a 20 percent service fee.⁶ The Employer then collects payment from the third party payer.

All subscribers to the Employer’s radio dispatch system are eligible to receive voucher fares; the lease agreement does not provide lease drivers any special priority. Access to voucher fares is a significant reason for owner-operators to subscribe to the radio dispatch service, as the Employer has agreements with some 200 entities generating a significant amount of business. Indeed, voucher customers are the primary source of income for the Employer, constituting approximately 50 percent of business overall and as much as 70 percent during periods of good weather. The Transit-Plus program alone accounts for about 10 percent of the Employer’s total revenue.

The traditional fare, known as either a cash or flag fare, is most familiar to the general public and the other significant source of business for drivers. If a driver wishes he or she can choose not to post on the dispatch network, but may instead wait at a taxi stand or in an advantageous zone for open fares. In Milwaukee the majority of flag fares are obtained at these taxi stands, primarily located at downtown hotels or other areas with a high amount of foot

⁶ The service fee covers the Employer’s cost of auditing and other costs related to financing the transaction.

traffic. As these fares are outside the dispatch system the Employer will have no record of the transaction unless the passenger pays with a credit card.⁷ A driver is allowed to negotiate cash fares, as long as the amount is not above the meter rate, and retains the entire fare and any gratuity. The Employer does not require drivers to report cash fares. In addition to cash fares a driver may also have “personals,” fares that are picked up at a regular time and place, or that contact the driver directly, again bypassing the dispatch service. These fares again are outside the dispatch service as well, and absent a credit card payment the Employer will not have a record of these transactions. Drivers are specifically prohibited, by contract, from having personals on Transit-Plus voucher fares.

The Employer’s profitability is highly dependent on repeat voucher business, as cash fares do not generate any revenue for the Employer.⁸ At hearing Christiansen stated that drivers “consistently” falsify vouchers, potentially overcharging the Employer’s clients. He also testified that it was common for drivers to engage in other practices such as stacking fares, where a driver accepts a new fare while in transit on another, that likely causing an unnecessary delay for the customer. In an effort to prevent this type of activity and avoid customer complaints the Employer operates an aggressive auditing program. The Employer employs three auditors to check claimed voucher amounts against a computer program that indicates the distance of the most efficient route. If the driver is found to have padded the fare by taking too long a route or an excessive amount of time the client’s bill is reduced and the difference is charged back to the driver. The auditors will also occasionally call customers to verify that they indeed took rides if

⁷ Credit card transactions are handled identically to voucher fares; the driver is paid up front minus a 20 percent service fee.

⁸ The Employer bills subscribers to its dispatch service on a monthly basis. The amount is dependent on the number of calls dispatched to the vehicle. Owner-operators are billed directly; the leasing entity generally is billed for lease drivers, who in turn pay for the service as part of their lease payments.

they have reason to believe the driver may have not serviced the fare, but still submitted the voucher. Potentially this type of falsification places the driver's passenger license at risk, and at hearing Christensen stated that in the future the Employer intends to turn over evidence of falsification to the City of Milwaukee for this purpose.⁹

The Employer also has several other tools that allow for review of driver performance. Recently "smart meters," that record the actual time and distance of the fare, were installed. Also, as noted above, the Employer's computer system allows a dispatcher to see when a driver has a fare because the meter is running. The computer system also has a GPS component that allows the dispatcher to determine a vehicle's position.

The facts discussed above, relating to the operation of a cab and the radio dispatch system, apply equally to all drivers whether they own their own cabs or lease the vehicles.¹⁰ These terms and conditions of employment accordingly correspond to the petitioned-for unit. However, the second aspect of the Employer's operation, lease management, applies exclusively to lease drivers.

The first aspect of lease management is controlling the lease application process; for lease drivers this constitutes the "hiring" process. As a precondition to applying for a lease, a driver must hold a valid Wisconsin Driver's and Milwaukee Public Passenger license. In order

⁹ Milwaukee County also reserves the right, as part of the Transit-Plus contract, to audit and remove any driver found to have overcharged. Installing the smart meter to assist in this auditing was a precondition of receiving the Transit Plus contract.

¹⁰ A third group of drivers, so called "secondary drivers," are also included in the Union's petitioned for unit. Secondary drivers are drivers who operate an owner-operator's cab but are not the owner-operator. Secondary drivers are identical to owner-operators in all relevant terms and conditions of employment, such as use of the dispatch system and eligibility for voucher fares. The only relevant difference between secondary drivers and owner-operators is that secondary drivers have no contractual relationship with the Employer. This attenuated relationship makes it difficult for the Employer to estimate the number of secondary drivers. While the Employer is required by regulation to have a passenger permit for each of these drivers the Employer lacks the data to determine whether these secondary drivers have recently operated a cab or merely have done so in the past. The Employer estimated it possessed approximately 345 secondary driver permits.

to receive a Public Passenger license an applicant must undergo a criminal background check and be fingerprinted. Once an applicant passes, photo identification is issued for display while operating the vehicle. The next step in the application process is for the Employer's insurance carrier to approve the driver. The individual then completes a lease application and, assuming approval, the individual will participate in several days of training.¹¹ Once the driver's lease is approved the Employer provides the vehicle, meter, radio, and any other physical item necessary to operate a taxicab, and accepts responsibility for operating costs of the vehicle such as maintenance and permit fees.¹² The vehicles leased by the Employer operate under the All City Veteran and American United brand names. In return for the above the lease driver pays rent on the vehicle.¹³

The primary factor determining the rental rate is how long the driver retains control over the vehicle.¹⁴ A twelve hour day shift costs the driver approximately \$500 a week, slightly less for the night shift. The driver picks up the vehicle at the Employer's garage, located approximately six blocks from the Employer's office, at the beginning of the shift and returns the vehicle to the same garage at the end. Absent scheduled maintenance or a specific problem the taxicab is then turned over to another driver and sent back out on the street. The Employer determines what vehicle the driver receives and the lease driver has no claim on any particular

¹¹ The Employer provides additional voluntary training to its drivers such as winter driving and customer service programs.

¹² The holder of the vehicle permit is required by law to maintain insurance on the vehicle. For lease drivers this cost is passed on via rent, but the lease also allows the Employer to charge the first \$1,500 in vehicle damage to the driver if an accident occurs.

¹³ The lease driver is also required to put up a \$1,000 security deposit. Accident damage and citations issued to the vehicle for which the driver is responsible, parking tickets etc., are deducted from this amount if not paid up front. Drivers are not required to post any sort of bond by either the Employer or regulation.

¹⁴ Sanfelippo also holds 22 of 53 airport permits; drivers leasing these vehicles pay a different rate based on this location.

vehicle once the lease term has concluded. Drivers also have the option under the lease of taking a vehicle on a “one-man shift” basis. This option costs a driver \$647.00 a week, but the driver retains control of the vehicle for the entire seven day period, 24 hours a day.¹⁵ A lease driver is specifically prohibited from subleasing his vehicle to a secondary driver.

As part of the weekly lease the driver receives a \$150 gasoline credit that can be redeemed at one of six gas stations in the Milwaukee area. In return for using these stations the driver receives a \$.07 reduction on each gallon of gas purchased. The driver is not required to put this gas in the cab, it can be used in a personal vehicle, but if the driver does not use the full amount of the gas credit it rolls over to the next week’s lease; it cannot be cashed out until the termination of the lease agreement. Once the rent has been paid the driver is free to use the vehicle for personal use, and the lease driver is free to work as much or as little as he or she wishes.

The lease agreement between the Employer and lease drivers specifically addresses the relationship between the parties. Although not dispositive of the issue, the lease does state:

By this agreement the LESSOR and LESSEE acknowledge and agree there does not exist between them the relationship of employer-employee, principal-agent, or master-servant, either express or implied, but that the relationship of the parties is strictly that of lessor-lessee, the LESSEE being free from interference or control on the part of the LESSOR of the taxicab.

The lease also makes clear that the lease driver is not eligible for unemployment benefits and workers compensation, and that the Employer is not responsible for withholding taxes.

As noted above these lease management factors apply only to lease drivers. Owner-operators enter into an arms length agreement with the Employer to provide the radio dispatch service. Assuming the owner-operator meets the minimum requirements established by

¹⁵ This arrangement is also available on a daily basis; this “daily shift” is one complete 24-hour period and costs \$135 in Milwaukee.

regulation, a valid passenger permit for the driver and a valid vehicle permit for the cab, the Employer does not inquire further into how the cab is operated. The factors discussed above regarding rent, the gas card, and limitations on subleasing are simply not applicable to owner-operators.

Analysis

Independent Contractor Determinations in the Taxicab Industry

The Board has a significant history analyzing the employee status of taxicab drivers. See *AAA Cab Services, Inc.*, 341 NLRB No. 57 (2004); *Stamford Taxi, Inc.*, 332 NLRB 1372 (2000); *Elite Limousine Plus*, 324 NLRB 992 (1997); *City Cab of Orlando*, 285 NLRB 1191 (1987); and *Checker Cab Co.*, 273 NLRB 1492 (1985). This analysis begins with the language of Section 2(3) of the Act, which mandates that employee status does not extend to “any individual having the status of independent contractor.” “Independent contractor” is not defined in the Act, but the Supreme Court has directed that Congress intended general common law agency principles to apply. *NLRB v. United Insurance Co.*, 390 U.S. 254 (1968).

In applying these principles the Board has considered a number of factors, many of which focus on the amount of control the Employer has over the individual. *Roadway Package System*, 326 NLRB 850 (1998).¹⁶ The Board has been careful to note, however, that the “right to control” is not an exclusive determining factor, but that the assessment must also consider all the facts of the relationship. *Friendly Cab Co., Inc.*, 341 NLRB No. 103 (2004), citing *Stamford*

¹⁶ Specific factors include: (1) whether individuals perform functions that are an essential part of the employer’s normal operation or operate an independent business; (2) whether they have a permanent working arrangement with the employer which will ordinarily continue as long as performance is satisfactory; (3) whether they do business in the employer’s name with assistance and guidance from the employer’s personnel and ordinarily sell only the company’s products; (4) whether the agreement which contains the terms and conditions under which they operate is promulgated and changed unilaterally by the Employer; (5) whether they account to the Employer; (6) whether particular skills are required for the operations subject to the contract; (7) whether they have a proprietary interest in the work in which they are engaged; and, (8) whether they have the opportunity to make decisions, which involve risks taken by the independent businessman that may result in a profit or loss.

Taxi, supra. In regard to taxicab drivers, however, the Board has given particular attention to two factors: the relationship between compensation and the amount of fares collected, and the company's control over the manner and means by which the drivers conduct business after leaving the garage. *Elite Limousine Plus* at 1001.

In regard to the first factor, the compensation relationship, where the driver pays a fixed rental for the vehicle and retains all fares collected without accounting for those fares, there is a strong inference that the Employer does not exert control over the individual sufficient to qualify finding employee status. *Friendly Cab Co.*, supra at slip op. 4, citing *City Cab Co. of Orlando, Inc.*, 285 NLRB 1191 (1987). In *Friendly*, supra, the Regional Director found that, because drivers paid a flat rental rate and the Employer made its money irrespective of the fares received by the drivers, the presumption applied, although the Union was able to overcome the presumption based on non-monetary criteria discussed below. The Board approved the finding of employee status, but specifically stated:

Contrary to the Regional Director, we find that the voucher system supports a finding that drivers are employees. The record reveals that voucher trips are fairly common; the Employer's dispatcher has complete discretion in assigning voucher work; drivers must redeem vouchers through the Employer; the Employer charges drivers a significant percentage of the voucher amount when it is redeemed; and the drivers perform voucher work for Friendly Transportation Company when its employee drivers are not available.

Based on the above, where drivers do not "retain" a significant portion of fares, but instead must have these fares processed by the Employer, the flat fee inference is improperly applied.

The second factor considers who sets the terms and conditions of employment of particular interest to taxicab drivers, traditionally items such as: who sets the driver's operating hours and break times, whether the dispatching entity tracks the driver and enforces limits on where and when a driver may collect fares, and whether rules and regulations direct the details of

driver appearance and behavior. *Elite Limousine Plus* at 1002. In *Friendly*, supra at slip. op. 5, the drivers were found to be employees based on non-monetary factors, including: a policy manual and standard operating procedures that covered a wide range of topics including safety, courtesy, respect, radio procedures, training requirements, and drug testing; a policy that required drivers to keep themselves and their vehicles clean and sanitary, and a specific dress code; a requirement that all calls for service must be conducted over an employer provided communication system and that drivers may not provide individual business cards or phone numbers to customers or develop their own independent relationship with individuals or businesses; a 3 to 6 hour annual class conducted by the employer covering policies and the laws dealing with discrimination that drivers were required to attend on their own time; a prohibition on drivers using their cabs for non-employer business, or sublease their cabs; and a prohibition on smoking or using cellular phones while in the vehicle. The employer also hired road managers to monitor the appearance of drivers and the cabs outside the employer's garage. *Id.* The Regional Director determined this "large amount of evidence of the employer's extensive control..." was found to overcome the strong inference of minimal control that is created when the Employer uses a flat rate system.

In considering both factors the Board acknowledges that the taxicab industry is heavily regulated, and does not consider employer restrictions on drivers mandated by law, such as setting fare rates or requiring drivers to be licensed and insured as a precondition of employment, to be significant indicators of employer control. *Id.* at 1003.

Independent Contractor Status in the Instant Case

1. Compensation Relationship

In regard to the first factor I find that the strong inference against employee status created by a flat rate system would be applicable, but for the Board's decision in *Friendly*, supra. As discussed below, the Employer in the instant case operates a voucher program nearly identical to the program in *Friendly*, slip op. at 1. In commenting on that program the Board specifically stated that such a voucher system supports a finding of employee status. *Id.* In light of the Board's direction, I find that the flat rate inference does not apply in the instant case as a significant portion of drivers' business is obtained under a voucher system.

In *Friendly*, as here, drivers were compensated through a mixture of cash, credit cards and vouchers. Supra at 3. In that case as well the employer charged drivers a significant percentage of the voucher amount when it is redeemed, with the employer retaining a service fee of 6 percent on credit card transactions, and a sliding scale on voucher payments ranging from 10 to 30 percent depending on the amount of the voucher. The employer did not require the driver to report cash fares or gratuities. As also noted in the quote above, the employer in *Friendly* required drivers to redeem vouchers through the employer. *Id.* This circumstance is also present in the instant case. It appears from the record that the only significant difference between the voucher system in *Friendly* and the instant case is that voucher fares are an even more common occurrence for the drivers in the instant case. Based on these facts I find the flat rate inference would be improper in the instant case, and that the Employer's compensation system is instead evidence in support of finding employee status.¹⁷

2. Manner and Means of Employer Control

The voucher system applies to owner-operators, secondary drivers and lease drivers

¹⁷ Although not necessary to address in detail in this decision I note that owner-operators, unlike lease drivers, face additional entrepreneurial risks and have substantial investment in their vehicle. These factors weigh heavily in favor of finding independent contractor status for owner-operators.

equally, and as a result the above conclusions regarding that system can be applied to all three groups equally. This is not the case with the second factor, however. It is clear from the record that owner-operators and secondary drivers operate completely independent of the Employer's management. As this is overwhelming evidence in support of finding independent contractor status for owner-operators and secondary drivers; the following analysis is only applicable to, and necessary for, lease drivers.

In regard to the second consideration, the manner and means of Employer control as drivers conduct their business, I find facts exist supporting both a finding of employee status and independent contractor status of lease drivers. However, on whole, for the reasons described below, I find these facts weigh more strongly in support of finding independent contractor status.

The instant case does present a number of facts noted in previous Board case law as weighing in support of employee status. In *Elite Limousine*, as here, the Employer could and did track a driver's location. Supra at 1002. In *Friendly*, drivers were prohibited from subleasing cabs, as are leased drivers in the instant case. Supra at 2. In that case drivers were also responsible for any traffic violations, and the Employer could collect damages from drivers in the event of an accident, both circumstances that apply in the instant case as well. The Employer also retained control over the vehicle to the extent it could be pulled off the road for maintenance and, once the driver returned the vehicle to the garage, the driver had no guarantee of being assigned the same vehicle on the next shift. *Id.* The relationship in the instant case also has these similar characteristics.

Several unique characteristics arising out of the lease arrangement in the instant case also weigh in favor of finding employee status. The gas credit system in particular creates the impression of employee status. Regardless of whether the discount drivers receive adequately

compensates for the loss of choice, what is telling under an independent contractor analysis is the control demonstrated by determining where drivers can obtain gas, one of their primary operating costs.

The Employer's auditing system also has characteristics that appear to weigh in favor of employee status. The level of investigation, up to and including actually calling passengers, would seem to demonstrate a level of supervision that correlates with employee status. From the record, however, it is apparent that clearly falsified overcharges do not result in discipline or termination of the lease, but merely a charge back to the driver. This method of handling an overcharge demonstrates that the Employer's primary concern is satisfying its customer, not disciplining the driver. Although Christensen speculated that in the future the Employer will report overcharging drivers to their licensing authority there is no evidence this has been done in the past. The overcharge mechanism weighs in favor of independent contractor status.

The Employer does take a disciplinary approach under some circumstances, however, and these instances do make employee status more likely. Lease drivers have had leases terminated for chronic complaints, poor driving habits, excessive or at-fault accidents, and the inability to insure. At hearing Christensen acknowledged that the Employer collects this data and that the Employer will, on occasion, recommend termination of the lease to the third party leaseholder. While this recommendation is not binding on owner-operators, for lease drivers this almost certainly will result in the loss of their lease. This influence over a driver's ability to operate a vehicle must be considered a strong factor in favor of finding employee status for lease drivers.

All of the factors listed above weigh in favor of finding employee status, however many of the facts present in cases such as *Elite Limousine Plus* and *Friendly* are missing in the instant

case. In *Elite Limousine Plus*, supra, the Employer set drivers' operating hours and break times, enforced strict limits on where and when a driver could collect fares, and maintained comprehensive rules regarding driver appearance and behavior. *Id.* In *Friendly*, supra, the Employer maintained comprehensive rules regarding driver appearance and behavior as well, and in addition prohibited drivers' opportunities to conduct independent business, prohibited personal use, and even prohibited smoking or using cellular phones while in the vehicle.

It is clear that level of control does not exist in the instant case. At hearing it was uncontested that drivers have flexibility determining when they will work, are free to stop working for any reason at any time, and that drivers may post to a zone of their own choosing. Further, the Employer has no specific guidelines regarding driver appearance and behavior, and does not regulate the details of the driver passenger interaction unless that interaction is so far outside the bounds of common courtesy as to result in the customer contacting the Employer with a specific complaint. The facts presented by the present case are more analogous to those described in *AAA Cab Services, Inc.*, supra at slip op. 5. In *AAA Cab Services* the Board noted, "In addition to being free to accept or decline Employer dispatches, drivers have substantial latitude in deciding how they operate their cabs. They are not restricted or assigned to any particular geographic area. Rather, they are free to work wherever they want." *Id.* Also noted is that "...drivers may set their own days and hours of work;" "drivers are not required to wear any particular clothing...they may dress as they please;" and that "drivers may also use their leased vehicle for personal business or pleasure." Each of these circumstances described in the *AAA Cab Services* context is also present in the instant case.

Further, the decision addresses the compensation relationship not involving the dispatch system:

...drivers are free to set their own rates, for example, drivers who are flagged down may agree to charge the rider a flat rate instead of using the meter. It is also not uncommon for drivers to have private clientele, who will contact the drivers via cell phone or pagers, and for drivers to charge these riders differently. *Id.*

The record reflects that the Employer and lease drivers have the same relationship regarding cash fares. The manner in which the Employer handles complaints and discipline is also indistinguishable from the facts of the instant case. The decision states:

The Employer does not have in place any handbooks, policy manuals, or rules of conduct for taxi drivers. However, the Employer may occasionally receive customer complaints about a driver, in which case the Employer will address those complaints with the driver. The Employer will terminate the lease agreement of a driver who is the subject of repeated complaints. *Id.*

The decision also notes that drivers have had their leases terminated after multiple accidents made the driver uninsurable. *Id.* The record reflects this aspect of the lease driver relationship is shared as well.

On whole I find that the facts of the instant case, as reflected on the record, are most analogous to those in *AAA Cab Services*. In that case the Board found the petitioned for drivers were independent contractors, not employees, on an analysis of the factors described above. On this basis I find that the petitioned for employees in the instant case are independent contractors and that the petition is properly dismissed.

Conclusion

I have concluded that the petitioned for individuals are independent contractors under the Act. I find that the flat fee inference of independent contractor status often utilized in taxicab cases is misplaced in this case in light of the decision in *Friendly*, *supra*. However, after considering the other aspects of the relationship between the Employer and drivers, including lease drivers, owner-operators and secondary drivers, I find the lesser manner and means of this Employer's control requires a finding of independent contractor status.

ORDER

The petition is dismissed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, Franklin Court, 1099 14th Street, N.W., Washington, DC 20570. **This request must be received by the Board in Washington by (14 DAYS) September 24, 2004.**

Signed at Milwaukee, Wisconsin on September 10, 2004.

/s/Irving E. Gottschalk
Irving E. Gottschalk, Acting Regional Director
National Labor Relations Board
Thirtieth Region
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